United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7382

United States Court of Appeals
FOR THE SECOND CIRCUIT

YAWATA IRON & STEEL CO., LTD.,

Plaintiff-Appellant,

against

ANTHONY SHIPPING CO., LTD.,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

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3) The Court erred in holding that the deceased Master was negligent in navigating the vessel.

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BRIEF FOR PLAINTIFF-APPELLANT

Statement of the Case

This is an appeal from an Opinion of the District Court, Southern District of New York (Lumbard, J.), dismissing the complaint against Anthony Shipping Co., Ltd., owner of the "M/V Antonios Demades."

On February 7, 1970, following an earlier failure of the No. 1 hatch cover in expectable weather, the "Antonios Demades" sank in the North Pacific Ocean. The vessel and her cargo were lost and of the ship's crew of thirty, ten men perished. Among those lost were the Master, the Chief Officer and a Second Officer. The only surviving deck officer was Second Officer Gregos (Opinion, 13a-14a, 16a; 261a).

Plaintiff is the owner of the entire cargo of more than 25,000 tons of prolerized steel and steel scrap. The agreed value of the cargo at the time of the loss is $1,458,014.58 (Opinion, 14a-15a; 260a; Exhibit 3).

The "Antonios Demades" was owned by Anthony Shipping Co., Ltd., a Livanos company, and was chartered by Hugo Neu Corporation of New York by charter dated December 19, 1969 for a voyage from New York and Boston to Japan (Opinion, 13a-14a; 259a).

Statement of the Facts

a. Concerning events which occurred before this voyage.

The "Antonios Demades" was a Greek owned, Liberian registered bulk carrier of 628′ 2″ in length and 74′ 9″ in width. She had a gross tonnage of 15,977, a net tonnage of 10,479, and was powered aft by a diesel engine of 11,200 brake horsepower (259a). The vessel had seven cargo holds, with a steel MacGregor hatch cover for each hold (259a; 411a).

On October 28, 1968 the "Antonios Demades" stranded at Quita Sueno Bank in the Caribbean. The vessel was not refloated until 8 days later, on November 5, 1968. As a

consequence of the grounding and subsequent refloating, the vessel sustained massive hull damage (Opinion, 26a-27a). The following month (December 1968) the vessel entered drydock in Osaka, Japan, for inspection and repairs, where she remained until January 28, 1969 (343a; 361a).

While in drydock at Osaka the American Bureau of Shipping surveyor, Omachi, examined the vessel and found extensive damage to bottom plates, internals in way of noted bottom plates; and floors and longitudinal girders in the forepeak tank, No. 1 double bottom tank port and starboard, No. 2 double bottom tank port and starboard, No. 3 double bottom tank starboard, No. 4 double bottom tank starboard, No. 5 double bottom tank port, No. 6 double bottom tank port and starboard, No. 7 double bottom tank port and starboard, double bottom diesel oil tank port and starboard, double bottom overflow tank, double bottom feed water tank, and the cofferdam under and around the lube oil tank (343a-352a, items 1-23).

The American Bureau of Shipping surveyor found damage on deck resulting from the grounding at Quita Sueno Bank, including handrails, stanchions, bulwark plate, *and steel hatch covers (MacGregor type) and hatch coaming top edges deformed at No. 1 through No. 7 hatches.*

Thus, in addition to the massive damage sustained throughout the ship, the vessel's steel hatch covers and hatch coaming top edges at No. 1 through No. 7 hatches were all deformed (362a-363a). "(T)he existence of such deformation of deck fittings indicated that the ship had been subjected to great stresses when it was grounded" (Opinion, 27a). Parts of each of the hatch covers had to be removed, faired and refitted and the hatch coaming top edges had to be welded up and ground where they met the hatch covers (362a-363a). The total cost of the repairs effected in Japan amounted to $316,000 (180a).

There is no evidence to show that between the time the "Antonios Demades" left Japan in January of 1969 and the time of her sinking on February 7, 1970, the vessel was ever tested to determine whether the repairs at Japan had been successful, i.e. to see what effect the actual op-

eration of the ship would have on these repairs. Some visual inspections were made of the holds and hatch covers by the ship's bosun and Chief Mate and on occasion by a surveyor before loading cargo (432a-433a; 438a). Visual inspections were made on September 9, 1969 by surveyors Morrison and Allison prior to a chartered trip and by surveyor Nielsen on December 22, 1969 (492a-493a; 499a; 206a-207a; 512a). No tests were performed by any of these surveyors nor did any of them enter the double bottom tanks of the vessel or operate the hatch cover at No. 1 hatch (495a-496a; 212a; Ex. D, p. 5; TM 435-436). There is no evidence that the carrier's marine superintendent, technical adviser or any other qualified person from the carrier's management staff examined the vessel or ran tests on the hatches, cargo holds or double bottom tanks. Nor did the carrier hire any independent consultant or marine expert to perform these tasks.

b. Concerning the events on the voyage prior to the failure of No. 1 hatch cover.

The "Antonios Demades" loaded 25,161.1 tons of cargo at Boston and New York. She sailed from Boston on January 6, 1970 for Japan via the Panama Canal. She was reprovisioned at Cristobal, and after departing there with 1006 tons of bunker fuel and 124 tons of diesel fuel on board, she transited the Canal and sailed from Balboa to Japan on January 14 (Opinion, 14a; 485a).

The "Antonios Demades" set out for Japan at full speed on a rhumb line course (413a). The vessel thereafter passed the Hawaiian Islands and Midway Island about 60 miles to port and came to course 278°T. She crossed the International Date Line on February 2 at latitude 30°N* and the weather began to worsen (260a, 413a-414a; Opinion, 14a). Second Mate Gregos, the only surviving deck officer, testified that at 0200 during his 0000-0400 watch on February 6, the wind was about force 7 (winds of 28-33 kts.) and that at that time the ship's speed was reduced from full ahead, i.e. 122 rpms, to 90-95 rpms

* When passing the International Date Line on February 1 the date was adjusted to February 2.

(Opinion, 14a, 36a; 414a; Ex. 37, p. 80; Ex. 38, p. 5). Mr. Gregos was again on watch from 1200 to 1600 on February 6. The vessel's speed was 80 rpms (415a) and the wind was from the west northwest at force 8-9, i.e. 34-47 kts. (Opinion, 36a; 69a; 479a). At about 1400 on February 6, while the Master and Mr. Gregos were on the bridge, the MacGregor steel hatch cover on No. 1 hold failed and No. 1 hold flooded (Opinion, 14a; 260a). The ship did not shudder violently, nor did Mr. Gregos feel anything unusual (Ex. 37, p. 70). The first time anyone became aware of any problem was when Mr. Gregos noticed dirty brown water on the port side of No. 1 hatch (416a).

"The hatch failure occurred soon after the storm commenced" (Opinion, 20a). There was nothing to indicate "that the wave that broke the hatch cover was abnormally large" (Opinion, 20a). When the hatch cover failed "the "Antonios Demades" did not encounter sustained winds in excess of the upper extent of force 9", i.e. 41-47 kts. (Opinion, 19a, 36a). This does not constitute a peril of the sea (Opinion, 19a). The vessel "did not encounter cross seas" nor was it "being buffeted about unduly in the storm for a long period of time" (Opinion, 20a).

The District Court specifically rejected the carrier's "peril-of-the-sea defense" (Opinion, 20a) and noted: *"There were many other ships in this storm, some in areas where the storm was worse, yet none of them sank"* (Opinion, 20a, emphasis added).

c. Concerning the failure of No. 1 hatch cover and the events thereafter.

When the No. 1 hatch cover failed, the Master reversed course to 098°T., immediately reduced speed and gave the order for a party to go forward to examine the hatch (Opinion, 15a; 260a-261a; 403a). The Third Engineer, who was asleep in his cabin when the hatch failed, was awakened and told to report to the bridge (543a). The Bosun, who was working aft with two other regular day men fixing a Jacob's ladder, received a telephone call to report to the bridge (461a; Ex. 40, pp. 29-30). In other words, the ship's personnel were going about their regular routine at the time No. 1 hatch failed. The Master, Third Engineer,

Bosun and some seamen met on the bridge and then went forward (Opinion, 15a; 417a; 461a; 543a). They "walked on the hatch cover of the No. 2 hold" and "went up to the top of the No. 1 masthouse" (Ex. 41, p. 4). It was discovered that two sections of the MacGregor hatch cover on No. 1 hold had "opened" and were on deck, "thrown down into the storing place, just aft No. 1 hold" (428a; 417a; 462a and sketch attached thereto). The hatch was filled with water (442a; 462a; 417a; Opinion, 15a).

The Master returned to the bridge and told Mr. Gregos that the hatch could not be closed (417a). The Master was concerned over the amount of bunkers still remaining. After he returned to the bridge "he tried to figure the amount of fuel on board" (404a). Mr. Gregos observed the Master "working in the chart room and figuring out how many miles we have to go and how many days remain" (405a-406a). Thereafter, the Master discussed the bunkers situation with the Chief Engineer (405a-406a).

Mr. Gregos was relieved by the Chief Officer at 1600. At about 1700 the course was changed back to 278°T (417a-418a). When the Third Engineer went down to the engineroom at 1700, he observed that water was being pumped out of No. 2 and No. 3 holds and No. 2 and No. 3 double bottoms by means of the bilge and ballast pumps; "pumping continued from then on" with 3 pumps, 1 ballast and 2 bilge pumps (544a-549a). Progressive flooding was occurring in No. 2 and No. 3 holds and No. 2 and No. 3 double bottoms, and the "Antonios Demades" was sinking gradually by the head with a list to starboard (143a; 227a-228a; 408a).

When Mr. Gregos returned to the bridge at midnight on February 6, the "Antonios Demades" was listing about 6° to starboard (418a). The list continued to increase and at 0500 on February 7 the Master ordered the crew to stand by to abandon ship, and ordered the Radio Officer to send out S.O.S. signals. The ship's position was then 33° 15′N. latitude and 157° 30′E. longitude (418-419a). At 0815 the order was given to abandon ship. The vessel gradually went down by the head and sank at location 33° 11′N. latitude, 158° 08′E. longitude (420a, 423a; 446a; 261a).

POINT I

The District Court erred as a matter of law in holding that the Antonios Demades was seaworthy. The Court specifically held that No. 1 Hatch failed during expectable weather. The burden of explaining the cause of this failure is upon the carrier. A presumption of unseaworthiness arises from the presence of sea water in the hull, from sinking, or from any other failure. The only possible conclusion under the District Court's findings is that the vessel was unseaworthy and that this unseaworthiness was a contributing cause of the loss.

The District Court held that the weather encountered by the "Antonios Demades" was not a peril of the sea and that: "The evidence indicated that storms such as the one involved here were common occurrences during the month of February in this area of the North Pacific" (Opinion, 16a). The vessel sank as a consequence of the failure of No. 1 hatch and subsequent flooding. Yet the District Court erroneously concluded that the vessel was seaworthy (Opinion, 24a, 35a, 38a). This cannot be so. The vessel was unseaworthy by reason of the Court's own finding that the failure of No. 1 hatch occurred in weather that was to be anticipated. There was no peril of the sea and yet the ship sank. The Court's conclusion that the vessel was seaworthy is inconsistent with its own findings.

A carrier's obligation to make the vessel seaworthy is strictly construed. In *Compania General de Tabacos de Filipinas* v. *United States*, 49 F.2d 750 (2 Cir. 1931), this Court held (p. 701) that the shipper ". . . bears no loss until the owner has done his best to remove all risk except those inevitable upon the seas." Any doubt about the vessel's unseaworthiness must be resolved against the owner. In *The Vizcaya*, 63 F. Supp. 898 (E.D. Pa. 1945), aff'd 182 F.2d 942 (3 Cir. 1950), cert. denied 340 U.S. 877 (1950), the Court said:

> ". . . if there is any doubt as to the unseaworthiness of the vessel, that doubt must be resolved *against* the shipowner." (p. 904, emphasis added)

Unseaworthiness of No. 1 Hatch

No. 1 hatch failed in expectable weather. In other words it failed when it should not have failed. As this Court has held, the carrier's obligation to make the vessel seaworthy is strictly construed. Any doubt as to unseaworthiness is resolved against the carrier. The conclusion is inescapable that the "Antonios Demades" was unseaworthy because the hatch was not competent to resist weather that was anticipated. Moreover, the carrier failed to explain the failure of the hatch, as it has the burden to do.

The judicial definition of seaworthiness is that the hull must be so tight, staunch, and strong as to be competent to resist all ordinary action of the sea. In *Dupont* v. *Vance,* 19 How. (60 U.S.) 162, 167 (1856), the Supreme Court said:

> "To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, staunch, and strong, as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo under deck."

In *The Southwark,* 191 U.S. 1, 8 (1903), the Supreme Court said:

> "Bouvier's Law Dictionary defines 'seaworthiness' to be: 'In maritime law, the sufficiency of the vessel in materials, construction, equipment, officers, men and outfit for the trade or service in which it is employed'."

More recently the Court in *Norris Grain Co.* v. *Great Lakes Transit Corp.,* 70 F.2d 32 (7 Cir. 1934), cert. denied 293 U.S. 565 (1939), summed up the obligation of seaworthiness (at page 35):

> "'Seaworthiness' means such fitness as to structure, lading, captain, crew, etc., as will enable a ship to encounter the winds and battering waves of the seas that must be encountered *during the season and in the places* where the ship must travel so that its cargo will be carried safely and delivered in good condition, as appellee in this case contracted to do." (emphasis added)

In *Petition of Reliance Marine Transp. & Const. Corp.*, 206 F.2d 240, 243 (2 Cir. 1953) [Proceeding by owner of chartered barge for limitation of liability], this Court said:

> "Seaworthiness is to be tested by ability to perform the service undertaken. The T. J. Hooper, 2 Cir., 60 F.2d 737. A vessel is unseaworthy unless she is reasonably fit to carry her cargo safely *despite the perils to be anticipated on the voyage.* [citations]" (emphasis added)

The District Court said:

> (a) "The Court does not believe that the storm encountered by the ANTONIOS DEMADES was a peril of the sea." (Opinion, 16a);
>
> (b) ". . . (I)n this case the court does not believe that the winds and sea encountered by the ANTONIOS DEMADES were of such magnitude to constitute a peril of the sea." (Opinion, 17a);
>
> (c) "Thus, the court . . . concludes that during the period of time when the No. 1 hatch failed the ANTONIOS DEMADES did not encounter sustained winds in excess of the upper extent of force 9."
>
> * * *
>
> "The question therefore becomes whether force 9 winds constitute a peril of the sea. I do not think that they do in the circumstances of this case." (Opinion, 19a)

And of great significance is the Court's finding:

> "*Indeed, the hatch failure occurred soon after the storm commenced* . . . Moreover, it does not appear that the wave that broke the hatch cover was abnormally large. There were many other ships in this storm, some in areas where the storm was worse, yet none of them sank." (Opinion, 20a, emphasis added)

The District Court simply misunderstood what unseaworthiness is. The Court said:

> "The finding that the ship did not encounter a peril

of the sea is not inconsistent with the finding that the No. 1 hold hatch cover was not structurally sound." (Opinion, 39a)

But it is inconsistent. Something must have been wrong with the hatch or it would not have failed. Defendant did not sustain its burden of explaining what caused the failure of No. 1 hatch.

The "Antonios Demades" was not competent to resist the weather encountered, which was anticipated and expectable. Her No. 1 hatch failed when it should not have failed. Under the findings of the District Court the conclusion is inescapable that the vessel was unseaworthy. It was the specific *known* structural failure, i.e., the failure of No. 1 hatch and subsequent flooding, that caused the sinking. But for the unseaworthiness of No. 1 hatch, there would have been no crisis and no sinking. As stated in *Orient Mid-East Lines* v. *A Shipment of Rice,* 496 F.2d 1032 (5 Cir. 1974), cert. denied 420 U.S. 1005 (1975):

> "*But for the unseaworthiness there would have been no crisis* and no accident. The unseaworthiness was a 'substantial factor' in the accident. See Restatement (Second) of Torts §§ 431, 433 (1965); W. Prosser, Law of Torts § 41 (1971). It formed a *crucial link in the chain of causation,* continued not broken by the response of Spetsiotis." (p. 1041, emphasis added)

Presumption of Unseaworthiness

In addition to the specific and known unseaworthiness of No. 1 hatch, which was unseaworthy by definition because it failed in expectable weather and which was a crucial link in the chain of causation of the sinking, there is a presumption of unseaworthiness that arises under the agreed facts of this case.

Firstly, there is a presumption of unseaworthiness when sea water enters the hull. Sea water entered No. 1 hold and thereafter Nos. 2 and 3 holds and Nos. 2 and 3 double bottom tanks during expectable weather. No. 1 hold filled completely. In *Wessels* v. *The Asturias,* 126 F.2d 999

(2 Cir. 1942), this Court said:

> "Proof of the presence of sea water, it cannot be disputed, raises a presumption of unseaworthiness which the carrier *must* rebut. The Folmina, 212 U.S. 354, 29 S.Ct. 363, 53 L.Ed. 546, 15 Ann.Cas. 748.
>
> * * *
>
> As the Trial Court found that the ship failed to rebut the presumption of negligence created by the presence of sea water, and as sea water contributed to the damage in some unknown degree, the ship is liable for the whole damage [citation omitted]." (p. 1001, emphasis added)

The Court below had correctly stated, "The efficient cause must be sought in those conditions or events which account for the entrance of sea water." (40 F.Supp. 168, at 173).

The District Court emphasized that the failure of No. 1 hatch on the "Antonios Demades" and the entry of sea water into No. 1 hold were unexplained (Opinion 28a, 39a, 45a). Years ago the Supreme Court held that the presence of sea water in watertight spaces must be fully explained by the carrier at risk of liability if it fails to do so. Accordingly, there must be a holding for cargo. In *The Folmina,* 212 U.S. 354, 362 (1909), the Supreme Court said:

> "As there must have been an efficient cause permitting the sea water to enter, so long as that cause remains undisclosed it cannot be said that the damage has been shown to have resulted from causes within the scope of a sea peril."

In this case the District Court held that there was no sea peril. Moreover, the weather was to be anticipated and the cause of the failure of the hatch was not explained.

Secondly, there is a presumption of unseaworthiness when a vessel sinks, as here, in expectable weather. This has also been an established rule of law for a long period of time. In *Commercial Molasses* v. *N.Y. Tank Barge Corp.,* 314 U.S. 104 (1941), the sinking of a barge was

unexplained. The Supreme Court held that there is a presumption of unseaworthiness where the sinking is unexplained. In *The Marine Sulphur Queen*, 460 F.2d 89 (2 Cir. 1972), this Court said:

> "*An owner has a duty to provide a vessel that can withstand expectable weather . . .*" (p. 100) (emphasis added)

In *Metropolitan Coal Co.* v. *Howard*, 155 F.2d 780 (2 Cir. 1946), this Court stated that the seas in the area of the barge's foundering

> "were no more than was usual in those waters at that season. At least, they were not of the exceptional violence which justifies the strange appellation—'an act of God.'"

> "The barge, having therefore *foundered* under conditions of wind and sea which she was intended to meet, was *unseaworthy in fact.*" (p. 783, emphasis added)

In *Brinegar* v. *San Ore Construction Co.*, 302 F.Supp. 630 (E.D. Ark., Pine Bluff Div. 1969), the Court stated:

> "When a vessel is sent on a voyage, the perils of which are reasonably to be anticipated and the vessel capsizes or *sinks, then the vessel is unseaworthy* and the owner-employer is liable *as a matter of law.*" (p. 634, emphasis added)

In *Federazione Italiana dei Cors. A.* v. *Mandask Companic de V.*, 388 F.2d 434 (2 Cir. 1968), the tank vessel "Perama" sank together with her cargo. The shipowner defendant denied unseaworthiness. This Court said (p. 436):

> "It is not disputed that the cargo was delivered to the carrier in good order and that subsequently it was entirely lost when the ship sank in fair weather and calm seas. Under these circumstances it is presumed that the loss was occasioned by the unseaworthiness of the *Perama.*"

The presumption of unseaworthiness has been extended to include all weather conditions which the vessel "must reasonably anticipate and overcome." *Walker* v. *Harris*,

335 F.2d 185 (5 Cir. 1964), cert. denied 379 U.S. 930. At page 193 the Court stated:

> "This analysis brings us, therefore to the application of the familiar doctrine, so often invoked where vessels sink in calm waters, that *sinking (or other failure)* under circumstances and conditions which the vessel must *reasonably anticipate and overcome* is the best proof of, and makes out the classic case of, unseaworthiness. Although not articulated in such terms, it is a sort of sea-going *res ipsa loquitur.*" (emphasis added)

At the time the No. 1 hatch failed there were no intervening forces or factors to explain the failure. It simply failed when it shouldn't have. The presumption of unseaworthiness arises from the mere presence of sea water in the vessel *or* from sinking *or* from any "other failure." On the "Antonios Demades" the hatch failed *and* the hold filled with sea water *and* the ship sank. How can there be any question but that the vessel was unseaworthy? The District Court said, "There were many other ships in this storm, some in areas where the storm was worse, yet none of them sank" (Opinion, 20a).

Based on the findings of fact by the District Court, the conclusion must be made that the vessel was unseaworthy because (1) No. 1 hatch failed when it should not have failed, and thus it was unseaworthy by definition; and (2) in any event, there is a presumption that the vessel was unseaworthy because sea water entered the vessel and she sank in expectable weather. The District Court erred in concluding that the "Antonios Demades" was seaworthy (Opinion, 24a, 35a, 38a). Plaintiff has sustained its burden of establishing that the vessel was unseaworthy.

Further Evidence of the Unseaworthiness of No. 1 Hatch

Plaintiff did not rely only on the specific failure of No. 1 hatch in expectable weather, which was unseaworthy by definition, or the presumption of unseaworthiness that arises from the fact of sea water entering the hull and

sinking in expectable weather. Plaintiff offered further corroborative evidence that the vessel was unseaworthy, and this evidence is a basis for recovery, even if the weather encountered by the "Antonios Demades" had been held by the District Court to constitute a peril of the sea, which it was not.* This evidence included testimony by the surviving deck officer that he had sailed on other vessels belonging to the same carrier with the same type hatches for six years, that he had encountered similar weather, and that the hatches on those vessels had not failed (373a, 389a-391a). An expert witness with very extensive sea experience testified that such hatches did not fail in weather substantially more severe (105a-106a). Plaintiff offered evidence that the "Antonios Demades" had previously stranded at Quita Sueno Bank in the Caribbean on October 28, 1968, had remained aground there for 8 days before being pulled off, and had sustained massive hull damage including *deformation* of the hatch covers and hatch coamings at all hatches (316a, 343a and 361a). The American Bureau of Shipping surveyor examined the vessel and confirmed that the *hull construction becomes deformed* when a vessel has been aground for a long time (329a-330a). The carrier's expert surveyor (Ganly) confirmed that there would have to be very substantial damage for the hatch covers and coamings to be damaged; that "you would have to distort all of the structure from the bottom up to the deck in order to twist the hatch coaming" (234a). Plaintiff's naval architect examined the survey reports, shipyard invoices and ship's plans and testified that approximately *50%* of the forward area was damaged (129a-130a). He testified that *deformation* to the hatch covers and coamings would cause failure "in either the wheel sections of the hatch covers or cause them to buckle" (127a).

The only evidence in the entire record that explains the failure of the hatch cover is the evidence of *deformation*

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* *The Manchuria*, 34 F.2d 843, 845 (9 Cir. 1929).

"If the ship was not seaworthy within this meaning of the rule on that subject, so that the cargo was liable to be damaged by a storm of ordinary intensity, the fact that the particular storm which did the damage was of extraordinary violence would not exempt the owner from liability [citations omitted]."

to the hatch cover and coaming resulting from the 8 day stranding. It is true the surveyor in Japan stated that the repairs were done properly. Cargo's naval architect testified, of course, that the hatch covers and coamings would have been restored to their original strength *if* repaired properly (Opinion, 27a). But the significant point is that the hatch failed when it shouldn't have failed. We submit that the inference should be made that the repairs were not done properly. Certainly, it can't be inferred that the hatch did not fail because it did fail.

The District Court examined this evidence and then inexplicably and erroneously concluded "that plaintiff failed to carry its burden in attempting to prove that the hatch cover on No. 1 hold was inadequately repaired so that the vessel was unseaworthy" and "that although the failure of No. 1 hold hatch covers was unexplained, the plaintiff has not established that it was due to improper repairs of prior damage or unauthorized structural modification" (Opinion, 28a). The point is that the hatch did fail when it should not have failed. Plaintiff does not have the burden of explaining the failure of the hatch. Plaintiff was not the bailee of the cargo, it did not operate the vessel, and it did not perform the repairs to the vessel after the grounding at Quita Sueno Bank in the Caribbean. The defendant-carrier has the burden of explanation. The District Court erred in (a) failing to find that the vessel was unseaworthy, and (b) in failing to find that the carrier-bailee had the burden of explaining the unseaworthiness of No. 1 hatch.

Burden of Explanation Is on Carrier

Under the General Maritime Law in the United States, courts have held for many years that the burden of explaining the cause of the loss is upon any carrier. After cargo has established a *prima facie* case by showing delivery of the cargo to the carrier and failure to redeliver at destination, the burden of going forward shifts to the carrier to explain the cause of the loss. This the carrier has not done, as the District Court emphasizes. The Court below said that "the failure of the No. 1 hold hatch cover was unexplained" (Opinion, 28a) and "Why the cover gave

way will never be known. The findings the Court has made primarily reflect that the party with the burden of proof could not demonstrate that its theory of why the hatch collapsed was correct." (Opinion, 39a) and "neither plaintiff nor defendant can explain the cause of the hatch failure" (Opinion, 45a).

The cargo owner did not undertake to "prove" the cause of the loss. Cargo offered the evidence stated above concerning the grounding at Quita Sueno Bank and the substantial damage sustained, including *deformation* of the hatch covers and coamings, as a possible cause of the loss. Cargo could not do more because the "evidence" sank and no post-casualty surveys were possible. But the burden of explanation is on the carrier-bailee, and not on cargo.

Plaintiff's cargo was shipped from U. S. ports under a charter party containing a Clause Paramount providing that the United States Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300-1315 governed the carriage of the cargo (Ex. 4). Accordingly, the applicable law is contained in COGSA (Opinion, 15a).

The U. S. Supreme Court holds that the law imposes an "extraordinary duty" upon a bailee entrusted with a shipper's cargo, and that the bailee has the burden of explaining the loss. This is fair and logical because the carrier-bailee is the one that knows or should know the facts and circumstances of the loss and is in the best position to know what happened. If the bailee fails to explain the loss then the risk of loss properly falls on the bailee. In *Schnell* v. *The Vallescura*, 293 U.S. 296, 304, 305 (1934), the Supreme Court said that a carrier

> ". . . is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, *the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability.*" (emphasis added)

The carrier has not explained the failure of No. 1 hatch, as it must do to avoid liability. Indeed, cargo which does not have the burden, has come much closer because of the evidence it offered concerning the previous *deformation* of the hatch covers and coamings.

The principles stated in the frequently cited *Vallescura* case, *supra,* are applicable to cases arising under the Carriage of Goods by Sea Act. *Scarburgh* v. *Compania Sud-Americana De Vapores,* 174 F.2d 423, 424 (2 Cir. 1949).

Under COGSA the carrier is charged with the "extraordinary duty" of a bailee, and the law places liability upon the carrier for losses *which he cannot explain* as well as such losses that he may explain but is unable to bring within an exception. *Interstate Steel Corp.* v. *S.S. Crystal Gem,* 317 F.Supp. 112, 118-9 (S.D.N.Y. 1970).

The defendants may indulge in surmise as to which of a number of things may have been responsible for the loss of the cargo. However, the plaintiffs' *prima facie* case cannot thereby be overcome. Judge Murphy, in *Karabagui* v. *The Shickshinny,* 123 F.Supp. 99, 102 (S.D.N.Y. 1954), aff'd 227 F.2d 348 (2 Cir. 1955), said:

> ". . . Prima facie evidence is, of course, like all evidence, susceptible to rebuttal; but unrebutted, it remains sufficient as a matter of law to establish the ultimate proposition it purports to prove [citing Kelly v. Jackson, 6 Pet. 622, 632]. It goes without saying that such evidence can only be overcome by contrary proof, and not by mere surmise and speculation."

The District Court held that defendant did not "explain the cause of the hatch failure" (Opinion, 45a). Accordingly, the carrier should be held liable.

Concurring Cause

The failure of No. 1 hatch was the initial and primary cause of the loss. Clearly, it was a *concurring cause.* But for the failure of No. 1 hatch there would have been no crisis and no sinking. The failure of the hatch was a "sub-

stantial factor" in the loss and formed a crucial link in the chain of causation. *Orient Mid-East Lines* v. *A Shipment of Rice, supra* (p. 1041). Even if the Master was negligent in his navigation, which is denied, the carrier is still liable because the unseaworthiness of No. 1 hatch was, at a minimum, a *concurring cause* of the loss. In other words, even if an exception under § 1304 of COGSA, such as error in navigation, is established, the carrier is still liable if the excepted cause is only a *concurring* rather than the *sole* cause of the loss. Certainly, the Master's action after the casualty at No. 1 hatch was *not* the sole cause of the sinking. Any action taken by the Master that can be construed as an error in navigation was the result of the failure of No. 1 hatch.

In *Ionian Steamship Co. of Athens* v. *United Distillers of America*, 236 F.2d 78 (5 Cir. 1956), Judge Brown stated:

> "It reasoned correctly that if the strandings were caused by unseaworthiness due to lack of due diligence, then it was not an excepted 'loss or damage arising or resulting from' [1] navigational error, [2] stranding or [4] latent defect, [6] any other cause without actual fault or privity, The Folmina, 212 U.S. 354, 29 S.Ct. 363, 53 L.Ed. 546; and *certainly not if these were merely concurring causes.*" (p. 80, emphasis added)

In the case of *Union Carbide and Carbon Corp.* v. *The Walter Raleigh, et al.*, 109 F. Supp. 781 (S.D.N.Y. 1951), aff'd 200 F.2d 908 (2 Cir. 1953), the Court said:

> "*The carrier has the burden* of showing that the loss was due to one of the excepted causes. Further, the *carrier has the burden* to show that it used due diligence to make the vessel seaworthy for the voyage. American Tobacco Co. v. The Katingo Hadjipatera, D.C. 81 F. Supp. 438. If it appears that there may have been several concurring causes of the damage, the burden is on the carrier to show that it was due to one of the causes excepted under the Carriage of Goods by Sea Act. And if it is shown that more than one cause was an effective and proximate cause of the damage and that one of the causes was the unsea-

> worthiness of the vessel, the fact that the other cause was an excepted cause under the Act does not relieve the carrier from liability. If *unseaworthiness* resulting from the carrier's failure to exercise due diligence to make the vessel seaworthy *concurs* with negligent management of the vessel by the officers, the carrier is liable. The Temple Bar, 45 F. Supp. 608." (p. 793, emphasis added)

The failure of the hatch cover was at the minimum a *concurring cause* of the loss. The District Court found that the weather encountered by the vessel was *expectable*. By definition the hatch had to be unseaworthy. The District Court further found that the cause of the failure was *unexplained*. The defendant has the burden of explaining the failure of the hatch which it did not do. Accordingly, the carrier should be held liable for the loss of the cargo.

POINT II

The vessel was also unseaworthy in that improper flooding occurred in holds Nos. 2 and 3 and in Nos. 2 and 3 double bottom tanks.

The crisis occurred when No. 1 hatch failed. As a consequence of this unseaworthiness No. 1 hold flooded. This was discovered by the Second Officer, who "saw dirty brown colored water on the port side after of the No. 1 hatch" and noticed that the "Surface of the water was then at the hatch cover level. I thought something happened in the forward" (416a). Despite the fact that the weather encountered was *not* a peril of the sea, improper flooding occurred in other compartments. This unseaworthiness was a contributory cause of the loss.

The hatch failure and flooding of No. 1 hold occurred soon after the storm commenced (Opinion, 20a). Likewise, progressive flooding started soon after the flooding of No. 1 hold. This was confirmed by Third Engineer Ntaginis, who testified that Nos. 2 and 3 holds and Nos. 2 and 3 double bottom tanks were *already* being pumped out at 5:00 P.M. The vessel didn't return to a westerly

course until 5:00 P.M. There is no excuse for the failure of the watertight bulkheads between the holds in weather that is expectable (not a peril of the sea) and particularly while the vessel was headed easterly and *downwind*. More significantly, there is no excuse for the flooding of the watertight double bottom tanks which are located under the cargo holds and not exposed to any seas (293a; 297a). The Third Engineer testified:

> "Q. Can you tell us, approximately, when the pumping first started on the double bottoms under No. 2, the double bottoms under No. 3, No. 2 cargo hold and No. 3 cargo hold?
>
> A. When I went down—
>
> Q. At 5:00 P.M.?
>
> A. Yes. They were being pumped out.
>
> Q. All of these?
>
> A. Yes.
>
> Q. And the pumping continued from then on?
>
> A. Yes." (546a)

The District Court recognized that it was because of the progressive flooding of Nos. 2 and 3 holds and Nos. 2 and 3 double bottom tanks that the vessel eventually sank (Opinion, 29a). However, the District Court erred in failing to hold that the fact of progressive flooding established that the vessel was unseaworthy (Opinion, 29a). The failure of the bulkheads and tank tops that permitted the progressive flooding was, by definition, unseaworthiness. The improper progressive flooding occurred during weather that was to be anticipated, and such flooding had already started during the period the vessel was sailing easterly on the *downwind* course between 2:00 P.M. and 5:00 P.M. on February 6. As set forth in Point I, above, the definition of seaworthiness is that the vessel should be competent to resist weather which is anticipated and expectable. There was improper flooding on the "Antonios Demades" when there shouldn't have been. Accordingly, the vessel was unseaworthy.

The "Antonios Demades" was classed by the American Bureau of Shipping (TM 295). The Rules of the American Bureau of Shipping require that bulkheads be water-

tight. Section 12.1 (467a) states that:

> "All vessels of ordinary type and normal form are to be provided with strength and watertight bulkheads in accordance with this section . . ."

Section 29.1.3 (471a) concerning vessels intended to carry ore (such as the "Antonios Demades") states:

> "Watertight bulkheads in accordance with Section 12 are to be provided."

The Courts recognize that bulkheads should be watertight and that progressive flooding is an unseaworthy condition. In *Petition of Southern Transportation Company, Incorporated*, 211 F.Supp. 940 (E.D. Va. 1963), the Court stated:

> ". . . There would have to be a *defective bulkhead* to permit water to enter the after peak tank and, while there is no affirmative evidence of such *defective bulkhead*, it is not unlikely that this was the major cause of the sinking when all proper inferences from the testimony are considered." (p. 945, emphasis added)

Watertight means just that, i.e., "watertight." Sea water should not get into the vessel to begin with. Once in, it should not have any further ingress into other compartments. Here, no matter which way the vessel went, either away from or into the seas, there was no watertight integrity.

The carrier's expert witness (surveyor Ganly) agreed that a bulk carrier like the "Antonios Demades" should have watertight bulkheads between the holds (228a). He also agreed that the tank tops between the cargo holds and the double bottom tanks below them should be watertight (229a). He agreed that the air vents to the cargo holds are vertical and do not go through the bulkheads between the holds (299a). He agreed that the air vents to the cargo holds do *not* go below the tank tops and into the double bottom tanks (229a-230a). The cowl type openings for the air vents to the cargo holds are located on top of the masthouse, well *above* the main deck (293a). Moreover, they had been removed by the bosun about 6-7 months before and plugged with wooden plugs and covered with three tarpaulin covers (447a; 231a). The carrier's ex-

pert witness (Ganly) agreed that this was true and that this is acceptable practice (221a, 231a). The openings to the chain locker in the bow of the vessel were stuffed with burlap and then filled with cement upon leaving Boston (447a). The carrier's expert agreed that there was no evidence in the record that the chain locker flooded or that the forepeak flooded (227a). The carrier's expert also agreed that the air vent on deck for the double bottom tanks "is a gooseneck job" and that "they have a ball type non-return valve . . . So that the water can't go in"; also they are protected from the seas by the bulwarks (230a, 236a). He agreed that the sounding pipes on deck are usually "flush with the deck or nearly so" (231a). The sounding pipes are covered with metal screw caps flush with the deck. In short, he agreed on cross-examination that the bulkheads and double bottom tanks should be watertight and that sea water should *not* enter any of the openings to them.

There is no evidence whatsoever in the record that sea water entered No. 2 and No. 3 holds through any openings on or above deck. The inspection party (including the Master) that went forward to No. 1 hatch did not report any structural damage other than the hatch itself. There is no support in the record for the theory advanced by the carrier's expert witness that water entered Nos. 2 and 3 holds via the *plugged* air vent trunk opening located *well* above the main deck, or through sounding pipes that are flush with the deck. They are supposed to be watertight, and there is no evidence that they were not. How could sea water possibly enter No. 2 and No. 3 double bottom tanks? They are located *below* No. 2 and No. 3 holds, respectively, and not exposed to any seas (293a and 297a).* How could sea water enter the double bottom tanks through the non-return gooseneck air vent openings on deck? It is not supposed to, and there is no evidence that it did. Moreover, the tank tops between the holds and the double bottom tanks are supposed to be watertight.

The theory advanced by the carrier's expert witness (217a-223a) is not creditable because there is no support

* We invite the Court to examine the General Arrangement Plan (Ex. 10) to see the location of these tanks.

in the record that flooding occurred in the manner he testified, particularly during the period the vessel was on an easterly *downwind* course. His theory is, at best, speculation as to the way sea water entered the holds. His theory is absolutely precluded insofar as it concerns No. 2 and No. 3 double bottom tanks and the non-return valves in the gooseneck openings on desk. It is a "sea story" in the sense that the carrier's expert witness does *not* "have sea experience" (223a); he doesn't "have experience in naval architecture design" (225a); he did not do any calculations (223a); he agreed with Mr. Gilbert's calculations (223a, 225a); he had never been on board the "Antonios Demades" (237a) and he didn't see or analyze the weather encountered by the "Antonios Demades". It is most significant that he was unaware that the weather he envisioned and based his testimony on was *not* in fact sufficient to be a peril of the sea. The District Court held that it was not a peril of the sea (Opinion, 17a). The hypothetical account by the carrier's expert witness is mere speculation, and does not relate to the actual facts in the record.

Sea water did improperly enter Nos. 2 and 3 holds and Nos. 2 and 3 double bottom tanks and, accordingly, the vessel was unseaworthy. The bulkheads and tank tops must have been defective. Cargo did not set out at trial to "prove" what caused the entry of sea water into these compartments. Cargo does not have that burden. The carrier has the burden of explanation as set forth in Point I above. Moreover, a presumption of unseaworthiness arises from the entry of sea water into these compartments. But cargo submits that the evidence of the 8 day grounding at Quita Sueno Bank and the massive structural damage which was sustained as a consequence of this grounding is a much more creditable explanation of the cause of improper flooding than the theory expounded by the carrier's expert witness.

The massive hull damage resulting from the 8 day grounding at Quita Sueno Bank was concentrated in the area around holds Nos. 1, 2 and 3 (487a and 489a). As much as 50% of the forward area was damaged (129a). There is no evidence anywhere in the record that a

"transit" was ever used at any time to check for *hull deformation* in the vessel (TM 267). The surveyor's report in Japan and the shipyard invoice confirm that there was *deformation all the way to the hatches and coamings* (353a; 362a-363a). The carrier's expert witness said:

> "You would have to distort all of the structure from the bottom up to the deck in order to twist the hatch coaming" (234a).

The *only* creditable evidence that explains the improper flooding of Nos. 2 and 3 holds and Nos. 2 and 3 double bottom tanks is the evidence of structural damage resulting from the stranding. There is a presumption of unseaworthiness because sea water entered these watertight compartments. The carrier has the burden of explaining the entry of sea water, which it did not sustain. Accordingly, the carrier should be held liable for the loss of the cargo.

POINT III

The Master was not negligent in navigating the vessel. Even if the Master was negligent, the alleged negligence was only a contributing cause of the loss, and not the sole cause.

But for the unseaworthiness of No. 1 hatch, there would have been no crisis and no sinking. The failure of the hatch and consequent flooding of No. 1 hold with seawater was a primary cause of the loss and formed a crucial link in the chain of causation. It *preceded* any alleged error in navigation by the Master. The alleged error in navigation by the Master occurred about 3 hours after the failure of No. 1 hatch and had nothing to do with the failure of No. 1 hatch; and even if the Master was *subsequently* negligent, which is denied, the carrier is still liable because the unseaworthiness of No. 1 hatch was, at least, a *concurring* cause of the loss. *Orient Mid-East Lines* v. *A Shipment of Rice, supra.*

The carrier's case was built on the defense that the vessel sank as a result of a peril of the sea (heavy weather).

The carrier said:

> "The clear and compelling evidence is that the sinking was due to a peril of the sea, aided by the master's unfortunate decision to continue heading into heavy seas with a stricken ship." (Defendant's Trial Memo. p. 13)

The District Court held that the weather encountered by the vessel in the North Pacific in February should have been anticipated and that it was not of such magnitude to constitute a peril of the sea (Opinion, 17a). Accordingly, the only possible exception for the carrier to escape liability is the alleged error in navigation [COGSA § 4(2)(a)] by the Master in turning back toward Japan.

The allegation against the deceased Master is unfair and unsupported. After the casualty at No. 1 hatch the Master reversed course and steered an easterly course for about 3 hours. During this time the Master, Third Engineer, Bosun and some seamen met on the bridge and then went forward to examine the hatch. It was discovered that sections 4 and 5 of the hatch cover on No. 1 hold had failed, and that the damaged sections had shifted aft of the hatch and next to the masthouse leaving the hatch open to the seas (428a; 417a; 462a and sketch at 464a). The Master returned to the bridge and told the 2nd Mate that the hatch could not be closed (417a). The casualty at No. 1 occurred at about 2:00 P.M. on February 6. At about 5:00 P.M. (3 hours later), the Master returned to a westerly course towards Japan, which was the closest refuge for a vessel of this size.

There were 3 surviving officers. The Third Engineer testified by deposition that figuring fuel consumption was the job of the Chief Engineer (551a). The Second Officer (only surviving deck officer) testified by deposition that after the Master returned from inspecting the hatch at No. 1 he calculated how much fuel was on board and whether he could continue. During this time the Master consulted with the Chief Engineer. The Second Officer said:

> "Q. What was done after that?
>
> A. We keep very slow speed, about 30 revolutions or 50 revolutions, and the captain tried to figure how

much fuel we have on board, and if we can continue our voyage to Japan.

Q. So then what did he decide to do?

A. He decided to turn and continue our voyage." (383a)

* * *

"Q. You indicated in your direct testimony that when the captain came back from the area of No. 1 hatch, he tried to figure the amount of fuel onboard?

A. Yes.

Q. Who did he do this with? Did he do it by himself or with the chief engineer?

A. The chief engineer gave him a report.

* * *

Q. At the time the captain tried to figure out the amount of fuel onboard, to see whether he could continue the voyage to Japan, this is after he returned from looking in the area of No. 1 hatch, did he discuss this with the chief officer?

A. What?

Q. The amount of fuel onboard?

A. Sure, but I wasn't present at the time.

Q. How do you know that the captain tried to figure out the amount of fuel onboard?

A. I saw him working in the chart room and figuring out how many miles we have to go and how many days remain.

Q. Was he by himself when he was doing this?

A. Yes.

Q. The chief engineer was not there, at the time?

A. No. He came later. *The chief engineer came to the bridge later, and they discussed,* but I wasn't present.

Q. You don't know what they said?

A. No. The only thing I can say, we continued our trip towards Japan.

Q. At the time the captain made this calculation, do you recall how much fuel was remaining onboard?

A. No, I don't." (404a-406a) (emphasis added)

The foregoing evidence by the *only* surviving deck officer establishes that the Master returned to a westerly course

towards Japan because he did not have sufficient fuel on board to continue to steam *away* from Japan. The Master figured the distance to go and the bunker fuel *then remaining on board.* After a period of about 3 hours, and after discussing the situation with the Chief Engineer, he returned to a westerly course towards Japan.

This decision was not rashly made, but was carefully considered. The "Antonios Demades" was a large bulk carrier. Moreover, the weather was not that severe (Opinion, 17a). The vessel had been riding only "a little bit easier" on the easterly course, according to the surviving deck officer (401a). When she returned to a westerly course at 5:00 P.M. she steamed at a reduced speed of 80 RPM compared to a regular sea speed of 122 RPM. In other words, there wasn't a significant difference when the vessel headed westerly again. It is to be noted that improper flooding had already commenced by this time (546a).

The above deposition testimony should be considered by this Court *de novo.* There were no live eyewitnesses called by the carrier at trial, and this Court should determine as a question of law whether the Master was negligent in the existing circumstances.

The Master perished when the ship sank. It is significant that the *Chief Engineer,* who is alive and who knew the exact amount of bunkers remaining on board, was not produced by the carrier.

Cargo had contended at trial that the vessel was also unseaworthy because she sailed with insufficient bunkers (Plaintiff's Post-Trial Brief pp. 81-85). RADM Patterson testified that the vessel was 67.38 tons short of having a 20% reserve and 109.44 tons short of a 25% reserve. Her reserve on this voyage was actually only 12% (101a-102a). The District Court held that the vessel sailed 34.5 tons *short* of bunker fuel (IFO) compared to what she should have taken on board (Opinion, 26a), for which there is no excuse. However, the Court erroneously accepted the carrier's late and strained argument that diesel oil on board for use in the auxiliaries (generators) could be used in the main engine "with little difficulty" (Opinion, 26a). The

opposite is true. RADM Patterson testified that diesel oil for the generators could be used in the main engine "provided they want to stop out at sea and change their injectors" (111a). Mr. Gilbert (a naval architect) testified that the operation of changing the injectors on a large main engine requires stopping the ship and takes three good men a minimum of 5 to 6 hours (TM 275).

The Chief Engineer, who was not produced, could have testified whether he and the Master considered changing the injectors on the main engine, and whether, in fact, this could have been done during the crisis without stopping and endangering the vessel by subjecting her to the mercy of beam seas in her then stricken condition.

More significant than sailing from Panama *short* of bunker fuel, is that no one who testified in this case knows how much fuel was actually on board the vessel at the time the Master turned back toward Japan. Five percent of the bunker fuel supply was probably *unusable* because the oil coats the sides of the vessel tanks or is unusable sludge (Opinion, 39a). The vessel had had a long voyage from Panama across the Pacific, and had been slowed by the weather (which increases fuel consumption) after passing the International Date Line on February 1 (Opinion, 14a). Even if the vessel had taken on sufficient fuel when sailing, which is denied, there is simply no evidence in the record that she had sufficient fuel on board at the time of the casualty to sail *away* from Japan and *back*. What reserve she had, had probably been used during the week she had been slowed by the weather, or was too small at that point to justify sailing *away* from Japan. There is no justification for second guessing the deceased Master on the basis of incomplete information.

The vessel should have had at least a 20% reserve of bunker fuel, and more likely 25%, for a voyage of this length at this time of the year in the North Pacific. *The Glymont,* 56 F.2d 252 (S.D.N.Y. 1932).

More significant yet is that the vessel's reduced freeboard forward, because of No. 1 hold being flooded together with the headwinds and seas from the west, would reduce her speed and *substantially increase her fuel consumption.* At the time the Master returned to a westerly course, there

may have been little or no reserve left to enable the vessel to reach a safe port in Japan, which was the closest place of refuge. The Master had to consider what remaining fuel he had on board on the following basis:

(1) He had been steaming *away* from Japan for three hours.

(2) He would have to steam more than three hours just to get back to where he was at the time of the casualty.

(3) He had to get to Japan eventually and steam against westerly headwinds and seas which would reduce his speed and increase his fuel consumption.

(4) The fact of the vessel being down by the head as a result of the flooding of No. 1 hold would substantially increase the fuel consumption of the vessel.

The *only* evidence in the record that explains the Master's decision to return to a westerly course is the Second Officer's testimony that the Master was extremely concerned about the amount of remaining fuel. Who is to say different? The Chief Engineer is the only possible person. Cargo submits that the Chief Engineer's testimony would have corroborated the testimony of the Second Officer rather than refute it, if he had been produced by the carrier. Under the facts of this case, the conclusion that the deceased Master negligently sank the vessel because of turning back toward Japan is intolerable.

There is no evidence to support the conclusion that the vessel had sufficient fuel for sailing *away* from Japan. All the evidence is to the contrary. The Master was confronted with a crisis and had to make a decision. The crisis arose as a result of the unseaworthiness of No. 1 hatch and flooding of No. 1 hold. There is no justification for second guessing the decision of the deceased Master (and Chief Engineer) on the basis of the amount of fuel taken on board back at Panama on January 13, some 7,000 miles away (Opinion, 25a-26a; 477a). There had been a long voyage and much had happened since then. Based on the

evidence that was produced, the Master's actions were reasonable.

Cargo has established a *prima facie* case, and the carrier has not sustained the burden of bringing itself within the excepted cause of error in navigation. Accordingly, the carrier should be held liable for the loss of the cargo. *Lekas & Drivas* v. *Goulandris*, 306 F.2d 426 (2 Cir. 1962).

POINT IV

The carrier did not meet the high standard of due diligence required under the Carriage of Goods by Sea Act. The burden is on the carrier to prove that it used due diligence to make the vessel seaworthy. The carrier must see to it that due diligence is in fact done. The duty to exercise due diligence is non-delegable even though the actual work may be assigned to others. Superficial inspections and general statements of seaworthiness are not sufficient.

A. Introduction

The District Court found that the carrier exercised due diligence both with respect to the No. 1 hatch and with respect to the vessel's structural strength (Opinion, 39a-40a, 42a). Plaintiff contends that in so finding the District Court erred. The issue of whether the carrier exercised due diligence "is not of fact, for it involves setting the standard of care". Due diligence is treated by this Court "as a question of law". *Continental Ins. Co.* v. *U.S.*, 195 F.2d 527 (2 Cir. 1952). See also, *Sidney Blumenthal & Co. Inc.* v. *Atlantic Coast Line R. Co.*, 139 F.2d 288, 290 (2 Cir. 1943); *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro*, 159 F.2d 661, 665 (2 Cir. 1947).

The burden is on the carrier to prove that it used *due diligence* to make the vessel seaworthy. This burden is clear-cut and never shifts from the carrier to cargo. Section 1304(1) of the Carriage of Goods by Sea Act provides that:

> "Whenever loss or damage has resulted from unseaworthiness, *the burden of proving the exercise of due*

> *diligence shall be on the carrier* or other persons claiming exemption under this section." (emphasis added)

Any question as to the exercise of *due diligence* is strictly construed against the carrier. *Compagnie Maritime Francaise* v. *Meyer,* 248 Fed. 881, 885. In *Metropolitan Coal Co.* v. *Howard* (2 Cir.), 155 F.2d 780, Judge Learned Hand said:

> "the warranty of seaworthiness is a favorite of the admiralty and exceptions to it or limitations upon it, are narrowly scrutinized." (p. 783)

In *The Otho,* 49 F. Supp. 945 (S.D.N.Y. 1943), aff'd 139 F.2d 748 (2 Cir. 1944), the Court quoted an English case, stating that

> "If the ship is allowed to go to sea in an unfit state, grave consequences follow. The lives of many men are at stake, and very valuable property. The utmost care must be taken. The duty must be fulfilled most thoroughly." (p. 950)

In *The Millie R. Bohannon,* 64 Fed. 883 (S.D.N.Y. 1894), the Court said:

> "'Due diligence' requires a carefulness of inspection and repair *proportionate to the danger.* The Edwin I. Morrison, 153 U.S. 199, 14 Sup. Ct. 823, affirming 27 Fed. 136." (p. 884) (emphasis added)

The carrier's obligation to use due diligence to make the vessel seaworthy is *nondelegable. The Esso Providence* (S.D.N.Y. 1953), 112 F. Supp. 630, 637; *Ore S.S. Corp.* v. *Hassel,* 137 F.2d 326, 330 (2 Cir. 1943). The diligence required by the law to make a vessel seaworthy is that of all of the carrier's employees, regardless of their position. In *International Nav. Co.* v. *Farr & Bailey,* 181 U.S. 218, the Supreme Court said:

> "The obligation was to use due diligence to make her seaworthy before she started on her voyage, and the law recognizes no distinction founded on the *character* of the *servants employed to accomplish that result.*" (p. 226) (emphasis added)

The vessel owner cannot delegate the duty of exercising due diligence to the Master or crew of the vessel. *The Bill*, 47 F. Supp. 969, 976 (D. Md. 1942), aff'd 145 F.2d 470 (4 Cir. 1944).

More important, the vessel owner cannot delegate the duty to a *shipyard*. *The Alvena*, 74 Fed. 252, 254 (S.D. N.Y. 1896), aff'd 79 Fed. 973 (2 Cir. 1897); *Standard Oil Co.* v. *Anglo-Mexican Petroleum Corp.*, 112 F.Supp. 630, 638 (S.D.N.Y. 1953); *The Hamildoc*, 1950 A.M.C. 1973, 1985 (Dom. of Canada, Kings Bench, Appeal Side 1950).

Inspection by experts is not sufficient to satisfy the duty of exercising due diligence to make the vessel seaworthy, *nor* does the phrase mean "*due diligence to obtain certificates of seaworthiness.*" See *Ionian Steamship Co. of Athens* v. *United Distillers of America, Inc.*, 236 F.2d 78 (5 Cir. 1956); *The Agwimoon*, 24 F.2d 864, aff'd 31 F.2d 1006, cert. den. 279 U.S. 874 (1929); *The Abbazia*, 127 Fed. 495 (D.C.N.Y. 1904); *The Poleric*, 25 F.2d 843, cert. den. 278 U.S. 623 (1928).

As stated in Point I above, the carrier is liable because it has failed to explain why No. 1 hatch failed in weather which was expectable, not unusual, and not a peril of the sea. Hatch covers are not supposed to fail in such weather. How then has the carrier sustained its heavy burden of establishing that it exercised due diligence to make the vessel seaworthy? The District Court stated: "Why the cover gave way will never be known" (Op. iv). Cargo submits that there are several possible explanations:

a) The *deformation* in the hatch cover and coaming could have been improperly repaired after the grounding at Quita Sueno Bank.

b) Overall *deformation* in the hull resulting from the grounding at Quita Sueno Bank.

c) The hatch cover or coaming could have been damaged during loading at various ports during the year which elapsed between the repairs in Japan and the final voyage.

d) The vessel could have been improperly maintained during that year.

e) The hatch cover could have been improperly operated in opening and closing it during that year.

There are numerous possibilities to explain why the "Antonios Demades" was, *in fact,* unseaworthy when she sailed on her final voyage. Cargo does not have the burden of proving which of these possibilities caused the unseaworthiness and resultant loss. The carrier has the *affirmative heavy burden* of producing sufficient evidence to establish that it *in fact* exercised due diligence to make the vessel seaworthy. Plaintiff submits that the vessel's unseaworthiness, the total failure on the part of the carrier to explain the cause of this unseaworthiness, and the paucity of evidence in this record relating to any effort at all by the carrier to exercise due diligence to make the "Antonios Demades" seaworthy, require a finding that the carrier failed to sustain its heavy burden of proving that it exercised due diligence to make the vessel seaworthy.

It is for this Court to decide whether the meager evidence produced by the carrier is sufficient as a matter of law to satisfy the standard of care which "due diligence" requires. *Continental Ins. Co.* v. *U.S.,* 195 F.2d 527 (2 Cir. 1952), *supra.*

B. Concerning No. 1 Hatch Cover

The District Court stated:

> "Why the cover [No. 1 hatch cover] gave way will never be known."
>
> * * *
>
> "In any event, with regard to the hatch covers there is no doubt that defendant exercised due diligence to ensure that they were seaworthy" (Opinion 39a)

The No. 1 hatch cover failed when it shouldn't have *and* the failure has not been explained by the carrier. In *The Alvena,* 79 Fed. 973 (2 Cir. 1897), this Court said:

> "All that can be said is that *it does not appear what caused the crack* . . . Inasmuch, however, as there is not sufficient evidence to show that the crack was caused by some accident after sailing, it becomes necessary for the ship to show such an inspection before sailing as would comply with the requirement that

'reasonable means' or 'due diligence' be taken or exercised." (p. 974) (emphasis added)

In *Southwestern Sugar & Molasses Co., Inc.* v. *Artemis Maritime Co., Inc.*, 92 F. Supp. 631 (E.D. Vir. 1950), aff'd 189 F. 2d 488 (C.A. 4, 1951), the Court said:

> "She urges the storm as the cause. *If so, it argues her own unseaworthiness, for the storm, in intensity and duration, was but typical and seasonal.* The Demosthenes was vulnerable to the normal wind and water of a voyage for which she was intended."
>
> * * *
>
> *"Thus her own revelation at sea of her actual unsoundness refutes the surveys and inspections,* and the vigilance of these is denied by the foreseeable, protracted and progressive nature of her debility. Ship and shipowner have not carried the burden of diligence imposed by Carriage of Goods by Sea Act, § 4, 46 U.S.C.A. § 1304, and judgment of liability must go against them." (emphasis added) (p. 632)

See also *The Edwin I. Morrison*, 153 U.S. 199, 212, 215 (1894).

How did the District Court reach its conclusion that the carrier exercised due diligence "to ensure" that No. 1 hatch was seaworthy, when in fact it was not? The Court based its conclusion on the following:

1. The defendant had the hatch covers "repaired and *was told* that the repairs were satisfactory" (Opinion, 39a-40a) (emphasis added); and, "Defendant had the ship repaired and the independent surveyor testified that the repairs were complete and adequate and recommended that the vessel's classification be maintained" (Opinion, 40a);

2. "Subsequent surveys by *cargo owners* (who would be particularly interested in the hatches) *suggested* no problems existed with respect to No. 1 hatch" (Opinion, 40a) (emphasis added); and,

3. "The ship's crew checked the hatches daily (weather permitting) and no problems with the No. 1 hatch were encountered." (Opinion, 40a)

The District Court added:

> "The shipowner could not reasonably have been expected to do more." (Opinion, 40a).

This is the crux of cargo's contention that the carrier did not exercise due diligence. More, in fact *much more,* should have been done by the carrier to fulfill its duty to exercise due diligence to ensure that the No. 1 hatch cover was seaworthy.

Repairs at Japan

The repairs and inspections at Japan occurred during December 1968 and January 1969, one year before this casualty. The repairs were made as a consequence of the vessel's grounding at Quita Suena Bank on October 28, 1968, where the vessel remained aground for eight days and sustained massive hull damage causing, among other damage, *deformation* in the hatch covers and *deformation* in the top edges of the hatch coamings of the holds (Opinion, 26a-27a; 343a and 361a).

It is true that cargo cannot show exactly in what respect the repairs and inspections at Japan were deficient. But cargo does not have the burden of explaining *why* the vessel was unseaworthy. The burden of explanation is on the carrier, not on cargo.

The District Court said:

> *"Significantly, if the repairs were done properly,* plaintiff's expert naval architect, John Gilbert, testified that *the hatch covers and coamings would have been restored to their original strength."* (Opinion, 27a) (emphasis added)

Thus, either the repairs were properly made in Japan or they were not. If the repairs were not properly made, then as a matter of law, the carrier has not sustained its burden of proving due diligence. If they were properly made, then the hatch covers and coamings would have been restored to their original strength and, aside from any subsequent improper operation and/or improper maintenance, No. 1 hatch cover would not have failed as it did. In other words, either there was something wrong with the repairs in Japan or there was something wrong with the

operation and/or the maintenance of the hatch during the following year.

What bearing does A.B.S. surveyor Omachi's testimony have on the carrier's duty to exercise due diligence? The law is clear on this point. Omachi was not employed by the carrier but by the American Bureau of Shipping (317a). His examination of the "Antonios Demades" was not made on behalf of the carrier but "on behalf of the American Bureau of Shipping" (318a). In fact, his testimony is that while the "Antonios Demades" was at the shipyard he stayed with the vessel only part of the time "because I had other jobs at that time" (319a). His examination of the vessel is not proof of the exercise of due diligence on the part of the carrier. Omachi was not on the carrier's staff nor was he there to exercise due diligence on the carrier's behalf. In *The Abbazia,* 127 Fed. 495 (S.D.N.Y. 1904), the Court said:

> "*The diligence required of vessels* to enable them to claim the benefit of the Harter Act (* * *), with reference to due diligence, *is diligence with respect to the vessel, not in obtaining certificates.*" (p. 496) (emphasis added)

In *The Ninfa,* 156 Fed. 512 (D.C. Ore. 1907), a vessel had been classed as seaworthy by the classification society surveyors. The Court said that "the due diligence required must have been exercised *in fact*" (p. 521, emphasis added) and stated:

> "*I place but slight value on the surveys of the Italian consul and Lloyd's surveyors, made before the ship left London, as their duties do not call for that rigid inspection and the application of known tests for the discovery of fault required of the owner for the determination of whether his vessel is seaworthy.*" (pp. 524-525, emphasis added)

As the Court said in *Standard Oil Co. of N. Y.* v. *U. S.* (*The Cohasset*), 26 F.2d 385 (S.D.N.Y. 1928):

> "Diligence in respect to the vessel itself, and not diligence in getting a seaworthy certificate, is the requirement." (p. 386)

In *The Liberator,* 1938 A.M.C. 141 (E.D.N.Y. 1937), the Court said:

> "The trier of fact must be satisfied that due diligence to make the vessel seaworthy has been used, and the courts have found in some cases, on the evidence before them, that *a vessel was not seaworthy in fact, in spite of the circumstances that certificates of seaworthiness had been issued by government surveyors, classification surveyors and representatives of cargo underwriters.*" (pp. 144-145) (emphasis added)

In *The President of India* v. *West Coast Steamship Company,* 213 F.Supp. 352 (D.C. Ore. 1962), the Court said:

> "If, in fact the 'Trader' was unseaworthy, certificates of surveyors and inspectors should be disregarded." (p. 359)

Thus the gathering of certificates of seaworthiness does not satisfy the obligation of a vessel owner to use actual due diligence to make its vessel seaworthy. See also, *The Otho,* 49 F.Supp. 945, 950 (S.D.N.Y. 1943), aff'd. 139 F.2d 748 (2 Cir. 1944).

Nor does turning the vessel over to a shipyard satisfy the carrier's duty of exercising due diligence. The requirement is that the repairs, in fact, be properly made. In *The Alvena,* 74 Fed. 252 (S.D.N.Y. 1896), aff'd. 79 Fed. 973 (2 Cir. 1897), the Court made this clear when it said:

> "The requirement of 'due diligence', however, is not satisfied by the mere appointment of competent persons to repair. Due diligence in repair and equipment must be exercised, *in fact.*" (p. 254, emphasis added)

In *The Hamildoc,* 1950 A.M.C. 1973 (King's Bench Appeal, Canada), the Court said:

> "Appellant argued that the extent of the repairs effected on the vessel established due diligence on the part of the owners. I cannot agree. *No amount of time spent in the repairers hands is itself going to establish due diligence.*" (p. 1985) (emphasis added)

In *Standard Oil Co. (N.J.)* v. *Anglo-Mexican Petroleum Corp.*, 112 F.Supp. 630 (S.D.N.Y. 1953), the Court said:

> "*There 'must be due diligence in the work itself, and not merely in the selection of agents to do the work;* otherwise, shipowners might escape all responsibility merely by selecting agents of good reputation, and would be relieved whether such agents exercised due care or not to make their vessel seaworthy, and any responsibility would be frittered away'." (p. 638)

Repairs were made on the "Antonios Demades" in Japan following a severe grounding. The A.B.S. surveyor Omachi examined the vessel in Japan. But there is no evidence to prove that the *carrier itself* exercised the due diligence required of it in connection with these repairs. Was the carrier's marine superintendent in attendance during these repairs? For that matter, did the carrier even have a marine superintendent to oversee the repairs and maintenance of its vessels? Who, if anyone at all, did the carrier employ to make sure that repairs were being properly carried out in Japan? The record is entirely devoid of any information in these respects. And yet the burden of coming forward with this data and of proving due diligence is on the carrier *and it is strictly construed. Metropolitan Coal Co.* v. *Howard, supra.*

What the carrier did is clear. It turned its vessel over to a repair yard and relied entirely on the inspection of a classification society surveyor.

Carriers have failed to prove their duty to exercise due diligence in cases where they have done far more than this carrier. For example, in *The Otho, supra,* the vessel had been repaired and inspected by the company's Marine Superintendent, by the American Bureau of Shipping, the United States Bureau of Marine Inspection & Navigation, the Master and the Chief Officer. This Court said that these inspections were not thorough enough and that ". . . it was not unreasonable to infer that the defect could have been detected by the exercise of greater care in examining hold No. 1 before commencement of the voyage in question" (p. 750). In *Navigazione Libera Triestina* v. *Garcia & Maggini Co.,* 30 F. 2d 62 (9 Cir. 1929), the Court held

that there was a lack of due diligence despite inspections by the Lloyd's surveyor and the Registro Italiano surveyor, the vessel's chief engineer and Master, and the chief technical inspector of the shipowner. In *General Motors Corp.* v. *The Olancho,* 115 F.Supp. 107 (S.D.N.Y. 1953), aff'd. 220 F.2d 278 (2 Cir. 1955), a vessel had undergone extensive repairs and inspections. The Court said:

> "The failure to locate the defective area of plate C-3 was due to the fact that some persons who were supposed to test the plates and look for defects did not do their job as it should have been done." (p. 115)

See also *Standard Oil Co.* v. *Anglo-Mexican Petroleum Corp., supra,* at page 639.

There is no doubt but that the "Antonios Demades" had sustained massive hull damage in October of 1968. A.B.S. surveyor Omachi testified that the hatch covers and coamings were *deformed* as a result of the grounding, and that *hull construction becomes deformed* when a vessel goes aground for a long time and tries to refloat (Opinion 26a-27a; 329a-330a; 353a; 362a-363a). There is every indication that the hull construction did become deformed.

Plaintiff's expert Gilbert, a practicing naval architect, testified that "The hatch coaming deformation is unusual" (159a). The carrier's expert witness Ganly testified that there would have to be very substantial damage in order for the hatch coaming and hatch covers to be damaged; that "you would have to distort all of the structure from the bottom up to the deck in order to twist the hatch coaming" (234a).

Mr. Gilbert testified as follows concerning the damage sustained by the vessel at Quita Sueno Bank and the use of a transit:

> "Q. . . . (W)hat tests would be performed, could be performed to check for any *permanent deformation.*
>
> A. You mean on the overall ship or on the—
>
> Q. *On the overall ship.*
>
> A. They would have to survey the vessel with a *transit.*

Q. What is a transit.

A. Well, it's like a telescope with a sight, and then you have to take survey marks on the vessel." (178a) (emphasis added)

The carrier's expert witness Ganly *agreed* that a *transit* should be used to check for hull deformation (241a-242a). It is submitted that one should indeed look for hull deformation in a case where a ship has been aground for eight days during which it sustained massive hull damage. Mr. Ganly has used transits on a ship during repairs to measure any tendency to change her shape (TM 482). But there is no evidence anywhere in this record that a transit was ever used at any time to check for *overall hull deformation* of the vessel (TM 267).

The vessel sustained substantial damage to 50% of the forward part of the vessel. There was *deformation* to the hatch covers and coamings, as found by the A.B.S. surveyor (353a). Mr. Gilbert testified that the *deformation* to the hatch covers and coamings would cause failure "in either the wheel sections of the hatch covers or cause them to buckle" (127a) and that such deformation was "a possible cause" of the failure of the hatch cover on February 6, 1970 (178a).

In *The Windsor Victory,* 278 F.Supp. 648, 654-655 (E.D. La., 1968), the Court said "the availability of alternative tests" is a factor which should be taken into account in determining what is due diligence. In the instant case *no transit* was used to test the "Antonios Demades" although it could have been and should have been used. In fact no test whatsoever was used for overall deformation in the hull.

Due diligence "depends upon the facts and circumstances of the particular case." *General Motors Corp.* v. *The Olancho, supra* at p. 115. The facts of this case are that the carrier did not have a marine superintendent in attendance during the inspections and repairs in Japan; that there is no evidence that the carrier even had a marine superintendent in its employ; that there is no evidence

that the carrier had employed *any* qualified person to oversee these repairs, e.g., a naval architect, consultant, or technical expert; that a transit was not used in the shipyard in Japan (Opinion 27a); and that no sea trials were conducted after the vessel was repaired and inspected (335a).

The carrier has not sustained its burden of proving that it exercised due diligence with respect to repairs in Japan during the months of December, 1968 and January, 1969.

The Period Between Repairs at Japan and The Sinking

Even if the carrier exercised due diligence with respect to repairs at Japan, which is denied, what about the period from the time the "Antonios Demades" left the shipyard in Japan to the time she sank? What was done by the carrier during that year with respect to ensuring that the vessel was maintained in a seaworthy condition?

The evidence produced by the carrier is clearly insufficient to satisfy *its burden* of proving that *it* exercised due diligence during that year. The evidence consists of the following:

1. Testimony of the ship's *broker and agent* Mr. Prapopulos, whose duties are to handle bunkering and to make arrangements for the vessel's itinerary and chartering (TM pp. 347-349). He is "not an expert" on maintenance and he had last been on board the "Antonios Demades" in 1967. The "Antonios Demades" sank in 1970 (TM 353, 364).

2. Testimony concerning a joint survey in Vancouver on September 9, 1969 by independent surveyors Morris and Allison, which was a survey on behalf of the vessel's charterer prior to a chartered trip, and testimony concerning a survey for cargo interests by independent surveyor Nielsen on December 22, 1969 (492a-493a; 500a; 206a-207a; 512a).

3. Testimony by the ship's bosun Kapantais that he and the Chief Mate made some *visual* inspections of the

holds and hatch covers (432a-434a, 438a) and testimony by the Second Officer that "the general condition of the ship" was good (376a).

The testimony of ship's broker Prapopulos is patently of no assistance to the carrier in attempting to prove due diligence.

Regarding the charter-type surveys by Morris, Allison and Nielsen:

(a) Examination of Mr. Morris' testimony (492a) indicates that he did not go into any of the double bottom tanks—only the holds. He did not have the plans of the vessel with him; he did not use a ladder to inspect the bulkheads (he only had a flashlight); *he did not conduct any tests; and he did not operate the MacGregor hatch covers at No. 1 hatch* (494a-496a). Examination of his survey report (Ex. C) also confirms that he did not enter any of the double bottom tanks or operate the hatch cover at No. 1 hatch.

(b) Examination of Mr. Allison's testimony (498a) indicates that his survey was a joint survey with Mr. Morris. He did not enter the double bottom tanks *and he did not operate the hatch cover at No. 1 hatch* (501a).

(c) Examination of Mr. Nielsen's survey report (512a) at New York reveals that the purpose of his survey was only "to ascertain the condition of cargo carrying enclosures" (512a). He did not enter the double bottom tanks; *he did not operate the hatch cover at No. 1 hatch* (TM 435-436); and, *he did not perform any tests* (212a). *His inspection was only visual* (211a-212a).

None of these surveyors conducted any tests or operated the hatch covers at No. 1 hatch or entered the double bottom spaces. There is no evidence that the carrier had told them to inspect the cargo holds keeping in mind that the "Antonios Demades" had sustained serious deformation to the hull, hatches and coamings in October, 1968; or that any of them even knew that the "Antonios Demades" had grounded in October, 1968.

The examinations by these surveyors were no more than the usual on-hire charter type inspections and were not

regarded by the ship's officers as extensive hull surveys. Second Officer Gregos, who was aware of the inspection by Nielsen in New York, testified that the vessel had not had any other surveys since the time she had been in the shipyard in Japan (Ex. 37, pp. 50, 61).

The data supplied by the testimony of the boatswain is likewise of no help to the carrier. At best, whatever inspections were made by ship's personnel were *visual* ones. *There is no evidence that any tests were made in connection with the vessel's holds and hatch covers.*

The law is clear that the carrier has not sustained its heavy burden of establishing due diligence by the evidence it produced in this case. In *The Windsor Victory*, 278 F.Supp. 648 (E.D. La. 1968), a vessel underwent a condition survey of cargo spaces for the purpose of noting any damage to the vessel existent before the loading (i.e., the same type of inspection as those of Morris, Allison and Nielsen). The Court held that a visual inspection of the pipe which broke, damaging cargo, "would not fully represent the conditions that would actually be experienced after the vessel was loaded" (p. 654). In holding that the carrier failed to exercise due diligence, the Court stated:

> *"In sum, the burden of proving due diligence was on the vessel, and it was not satisfied by showing a visual inspection, even if adequate tests had been made 17 months earlier."* (p. 655) (emphasis added)

The "Antonios Demades" had been repaired in December 1968-January 1969. Even if the repairs had been adequately made, which is denied, these repairs were made almost 12 months before the loss. "The burden of proving due diligence was on the vessel, and it was not satisfied by showing a visual inspection" (*The Windsor Victory, supra*).

In *The Charlton Hall*, 285 Fed. 640 (S.D.N.Y. 1922), the Court said:

> "The rule is that a vessel, which relies on external appearance that she was in proper condition for stowage of cargo, *in lieu of tests*, takes the risk of show-

ing that the inspection and examination was diligently made." (p. 642) (emphasis added)

In *The Californian,* 1934 A.M.C. 179, 187 (E.D.N.Y. 1934), 82 F.2d 283 (C.A. 2, 1935), cert. denied 298 U.S. 690 (1936), the Court held that a "test sufficient to ascertain the condition of the tank tops should be made" and it is not satisfied by "the casual inspection of the chief officer" (p. 187). In *Warner Sugar Refining Co.* v. *Munson S.S. Line,* 23 F.2d 194 (S.D.N.Y. 1927), aff'd 32 F.2d 1021, the Court found that the heavy seas encountered were not a peril of the sea, and stated:

> "If a vessel owner is satisfied to rely on *external appearances* that the vessel and her appliances are in such good order that it is safe to take cargo on board, *instead of making fair examinations and tests, the vessel owner assumes the responsibility for such defects as may exist and which a diligent examination would reveal. And a shipowner has not sustained the burden of exercising due diligence by a mere superficial inspection; nor where the inspection or the evidence is insufficient to support a finding of good condition,* or that a diligent effort had been made to put her in good condition." (p. 197, emphasis added)

See also *The Leerdam,* 8 F.2d 295 (E.D. La. 1925), aff'd 17 F.2d 586 (5 Cir. 1927).

In *The Agwimoon,* 24 F.2d 864 (D.C. Md. 1928), an inspector used a pocket flashlight. The Court held that the vessel owner had not exercised due diligence. In *The Flamborough,* 69 Fed. 470 (S.D.N.Y. 1895), a vessel encountered bad weather two days after leaving port. She soon began to leak and cargo was damaged. Subsequent examinations showed that the leak had occurred "through one of the plates wasting" (p. 470). The Court said that the vessel was so:

> ". . . unserviceable that I find the inspection theretofore made *could not* be such as 'due diligence' under the 'Harter Act' requires." (p. 471) (emphasis added)

The failure of No. 1 hatch cover in weather such as that encountered by the "Antonios Demades" demonstrates that the vessel was "unserviceable" and that the visual inspections "theretofore made could not be such as 'due diligence' requires." (The Flamborough, supra)

Trip inspections by cargo surveyors are not sufficient. In *Petition of Southern Transportation Company, supra,* where surveys were made for cargo interests, the Court said:

> "The barge BA-1401 was in fact unseaworthy at the commencement of her voyage . . . and carriers [the owner], in relying upon the two surveys previously made, failed to exercise due diligence to make the barge seaworthy." (p. 945)

See also, *The Bill, supra,* at 975-978; *The Heddernheim,* 39 F.Supp. 558, 563-564 (S.D.N.Y. 1941); and *The Gonzenheim,* 36 F.2d 869, 870 (5 Cir. 1930). The point is that the vessel owner must see to it that due diligence is in fact done. He can't rely on others because the *duty* is non-delegable even though the actual work may be assigned to others.

There is not one iota of testimony in this entire record to show that the carrier performed any tests whatsoever on No. 1 hatch or on any other part of the "Antonios Demades" from the time she left Japan in January, 1969 to the time she sank on February 7, 1970. This, despite the fact that the vessel had sustained earlier massive damage and should have been tested during the following year to determine the effect of the seas upon these repairs. After a ship had undergone repairs as the "Antonios Demades" had, a prudent vessel owner would not close his eyes but would follow up to see whether the ship was in fact seaworthy.

The carrier has failed to explain the cause of the failure of No. 1 hatch. What sort of maintenance was performed on the vessel during the year before she sank? What records, if any, did the carrier keep regarding upkeep and maintenance of this vessel? None were produced. Where are the log abstracts and voyage reports which the ship would have sent to the owner? None were

produced. How many times was the No. 1 hatch loaded with cargo since the repairs in Japan? Who, on behalf of the carrier, inspected the No. 1 hatch and No. 1 hatch cover during that period? What were the results of these inspections? Where are the reports? None were produced.

In *The Assunzione*, 1956 (2) Ll. L. Rep. 468, the Court held that the owner failed to sustain its burden of establishing due diligence and stated:

> "Be that as it may, what I think is even more significant, when I am examining a claim by owners to have exercised due diligence, is that they have not put before me one single word in any report from any surveyor of their own at any time in relation to this vessel. I am excluding, of course, the surveyors' reports which came into existence after the casualty. I am talking now about the period before the casualty. Perhaps of even greater significance is the fact that I have not seen any of the repair accounts, which one would have thought must be in existence, dealing with *ordinary maintenance repairs* of the vessel during the last two or three years before the casualty. It might have helped me very much to arrive at a view as to the degree of diligence with which these owners were maintaining their vessel; but I have not had that advantage. There is no evidence to show, so far as I can trace it, that these owners ever did in fact employ a surveyor of their own to inspect the vessel, *as opposed to classification society surveyors; nor is there any evidence to show that they had any superintendent of their own.*
>
> * * *
>
> 'All those who have not got their own superintendent normally employ a consultant to act for them.' I am aware of Mr. Rolland's standing in his profession, and I attach considerable weight to those words, coming from him, as to what is and what is not good practice"

and

> *"Here what I am concerned with is the owner's duty in relation to the day to day maintenance and upkeep of his (owner's) ship."* (pp. 485-486, emphasis added)

In *United Distillers of America* v. *T/S Ionian Pioneer*, 130 F.Supp. 647 (E.D. La. N.O. Div. 1955), aff'd 236 F.2d 78 (C.A. 5 1956), the Court said:

> "*Initially it is clear that for the purpose of determining due diligence, not only may the conduct of the owner and his port employees be inquired into,* but the owner is responsible as well for the conduct of the ship's personnel prior to the time the vessel breaks ground after lifting the cargo, in so far as that conduct may affect the seaworthiness of the vessel."

Repairs in Japan included cutting off the elongated links and adjusting the connecting chains between *all hatch covers* (362a). The bosun testified that when he went forward and saw the damage at No. 1 hatch, the chain had parted and neither the chain nor the hatch cover wheel were there (453a-454a). On February 16, 1970 the bosun also stated "about 5 months ago all the chains of the hatch covers were replaced by new ones" (461a, 463a). Why were the chains replaced in September, 1969, i.e., only 7-8 months after the vessel had left the repair yard in Japan? Were the chains which were put on in August, 1969 tested and examined by anyone? Was the American Bureau of Shipping aware of this? Why wasn't someone from the carrier's management staff called to testify regarding them and to explain the need for new chains on all the hatches?

Where is the marine superintendent, or whoever the owner employed as its technical expert to be responsible for the maintenance, repair and upkeep of its vessels? There is no proof that this carrier even employed such a person. A marine superintendent is defined in de Kerchove's, *International Maritime Dictionary* (2nd Printing 1948) as follows:

> "Marine Superintendent. One who has the oversight and charge of all vessels belonging to a shipping company and is directly responsible to the managing director for the care, maintenance and upkeep of ships and the manning of the deck department . . . Sometimes called port superintendent, port captain (U.S.)" (p. 449)

The "Antonios Demades" was a vessel in the fleet operated and controlled by the Livanos complex (389a; Ex. 40, pp. 3, 21; Tr. 359-360). If the carrier did not have a marine superintendent in its employ, due diligence is totally lacking. If the carrier did have a marine superintendent in its employ, *who did not testify,* then the carrier has failed to sustain its heavy burden of establishing due diligence in not calling him as a witness. It is no wonder that the cause of the failure of No. 1 hatch cover remains unexplained. The carrier has not even tried to sustain its burden of explanation.

C. Concerning Structural Strength And Progressive Flooding

What has been said above regarding due diligence and the No. 1 hatch applies equally as well to the lack of structural strength of the "Antonios Demades" and resultant progressive flooding. The law is clear that neither the certificate of the classification society surveyor nor mere visual examinations of on-hire-charter surveyors nor mere visual inspection of ship's personnel can establish due diligence with respect to a vessel's structural strength.

Mr. Gilbert, a naval architect, testified that a transit was not used in connection with repairs in Japan, as it should have been to check for overall hull deformation (TM 171 172, 267, 159a, 241a-242a). The hatch covers and coamings were deformed as a result of the grounding in October, 1968 (Opinion 26a-27a; 329a-330a; 353a; 362a-363a). The carrier's expert, Mr. Ganly testified:

> "You would have to distort—I will tell you exactly I will answer your question. *You would have to distort all of the structure from the bottom up to the deck in order to twist the hatch coaming.*
>
> The hatch coaming itself is not going to be damaged merely because you have got damage 40 or 50 feet away from it without the intervening structure being damaged. You have got to carry the stress and strain from the bottom up to the top." (234a) (emphasis added)

Ganly had never in his life seen this, *yet it happened to the "Antonios Demades"* (Opinion 26a-27a; 234a).

Surveyors Morris, Allison and Nielsen (conducting cargo-charter type surveys) did not examine the double bottom tanks of the "Antonios Demades" (Ex. C; Ex. D, p. 5; TM 435-436). When the No. 1 hatch which was clearly unseaworthy failed, water entered No. 1 hold and progressive flooding commenced shortly thereafter. Eventually Nos. 2 and 3 holds *and Nos. 2 and 3 double bottom tanks flooded* (Opinion 29a).

Regarding the inspections performed after the vessel left Japan a year before the sinking, the District Court said:

> ". . . the later *visual* surveys indicate that no significant leaks existed. Thus, the defendant exercised sufficient due diligence to meet his obligation to provide a seaworthy ship." (Opinion 42a)

This is clearly wrong. Visual inspections are not sufficient. *"The Windsor Victory", supra; "The Charlton Hall", supra; Warner Sugar Refining Co.* v. *Munson S.S. Line, supra;* and see other cases above in connection with due diligence and the failure of No. 1 hatch cover.

There is no evidence in the record that the carrier hired a naval architect to oversee repairs in Japan; that it had a marine superintendent in attendance there; that it had anyone at all inspect the ship and run tests as to its structural soundness from the time it left Japan until the time of sinking; that anyone ever inspected the double bottoms, ran pressure tests on the bulkheads of the various compartments, or checked the structural soundness of the vessel after it left Japan; or, that the carrier in any way, shape or form paid even lip service to its obligation to exercise due diligence with respect to ensuring the seaworthiness of its vessel.

Summary of Due Diligence

In addition to the loss of the ship's entire cargo, ten men perished in this tragedy. Any decision ultimately holding that this carrier produced sufficient evidence to satisfy the strict burden of proving that it exercised "due diligence" to make the vessel seaworthy would reduce the standards

that have heretofore been required for safeguarding life and property at sea. The carrier *has not* explained what caused the No. 1 hatch cover to fail; it *has not* demonstrated that it took any interest in the repairs conducted in Japan, a year before the casualty; it *has not* produced any records of *its own* regular maintenance, inspection or testing of the vessel or her compartments for an entire year preceding this casualty; and it *has not* produced the company's marine superintendent, if any, to testify.

Conclusion

The "Antonios Demades" sank in expectable weather because she was unseaworthy. This unseaworthy condition was a proximate cause of the loss. The carrier has not explained the failure of the No. 1 hatch, nor has it sustained its burden of proving that it exercised due diligence to make the vessel seaworthy.

The judgment of the District Court should be reversed and cargo should be awarded judgment against Anthony Shipping Co., Ltd. in the amount of $1,458,014.58, together with interest and costs.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

YAWATA IRON & STEEL CO., LTD.,

Plaintiff-Appellant,

against

ANTHONY SHIPPING CO., LTD.,

Defendant-Appellee.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN , being duly sworn, deposes and says that he is over the age of 18 years. That on the 16th day of October , 1975, he served two copies of Brief for Plaintiff-Appellant on Cichanowicz & Callan, Esqs. , the attorneys for Defendant-Appellee by delivering to and leaving same with a proper person in charge of their office at 80 Broad Street in the Borough of Manhattan , City of New York, between the usual business hours of said day.

Irving Lightman

Sworn to before me this
16th day of October , 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976